El Rio Santa Cruz Neighborhood Health Center, Inc. *and* American Federation of State, County and Municipal Employees, Council 97, AFL–CIO–CLC. Case 28–CA–10092

February 8, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On October 5, 1990, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings as modified,[1] and conclusions and to substitute an Order that more closely conforms with the judge's findings, conclusions, and remedy.[2]

Although we adopt the judge's conclusions, we modify his analysis as follows. We agree with the judge's finding that, in making its decision to discharge Cupis, the Respondent considered and relied on both her protected and unprotected conduct. We do not assume, however, as the judge did, that because the Respondent made no distinction between the two, each reason weighed equally in the decision. Nor do we find it necessary to assess the weight given to each reason in determining if the Respondent has met its *Wright Line*[3] burden. Rather, we find that because the judge did not accept Lindenberg's self-serving testimony that she would have terminated Cupis on the basis of the unprotected conduct alone and because there was no other evidence establishing her claim, the Respondent has not shown that the same decision would have been reached in the absence of the protected conduct.

[1] In view of our adopting the judge's finding that Respondent violated Sec. 8(a)(1) by discharging Sylvia Cupis, we find it unnecessary to address the General Counsel's contention that the discharge also violated Sec. 8(a)(3). Finding that additional violation would not materially affect the Order.

In its brief, the Respondent attacks the judge's discrediting part of the testimony of Janet Lindenberg, the Respondent's director of medical records. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge.

[2] We shall provide the standard expungement remedy and conform the notice with the Order.

[3] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ORDER

The National Labor Relations Board orders that the Respondent, El Rio Santa Cruz Neighborhood Health Center, Inc., Tucson, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for engaging in concerted activities for mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Sylvia Cupis immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges previously enjoyed.

(b) Make whole Sylvia Cupis for any loss of pay and other benefits she may have suffered as a result of the unlawful discrimination against her, plus interest, in the manner set forth in the remedy section of the judge's decision.

(c) Remove from its files and records all references to her unlawful discharge and notify Sylvia Cupis, in writing, that this has been done and that the evidence of this unlawful action will not be used in any manner as a basis for future personnel action against her.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at clinic in Tucson, Arizona, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees for engaging in concerted activities for mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Sylvia Cupis immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, plus interest.

WE WILL remove from her files and records any reference to the dismissal of Sylvia Cupis and notify her in writing, that this has been done and that the evidence of this action will not be used in any manner as a basis for future personnel action against her.

EL RIO SANTA CRUZ NEIGHBORHOOD HEALTH CENTER, INC.

Robin R. Bucknell, Esq., for the General Counsel.
Barry Kirschner, Esq. (Stompoly & Stroud), of Tucson, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Tucson, Arizona, on April 26 and 27, 1990. On January 17, 1990, American Federation of State, County and Municipal Employees, Council 97, AFL–CIO–CLC (the Union) filed the original charge alleging that El Rio Santa Cruz Neighborhood Health Center, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). On February 26, the Regional Director for Region 28 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(3) and (1) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing. The issue is whether Respondent discharged its employee Sylvia Cupis (Cupis) because Cupis joined, supported, or assisted the Union or engaged in other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent El Rio Santa Cruz Neighborhood Heath Center, Inc., an Arizona corporation, has been engaged in the operation of a not-for-profit neighborhood health clinic in Tucson, Arizona. During the 12 months prior to issuance of the complaint, Respondent derived gross revenues in excess of $250,000 from its operation of its health care facility. Further, during the same time period, Respondent purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Arizona. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Accordingly, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Cupis initially worked for Respondent as an accounts receivable clerk from January 1977 until January 1986. In January 1986 Cupis was laid off in a reduction in force. In March 1989, Cupis was rehired to work as a temporary X-ray clerk for up to 6 months while a permanent employee was on maternity leave. Cupis was eligible for other temporary or permanent positions as an in-house applicant. This gave Cupis preference over applicants who were not currently employed by Respondent. After 3 months as a temporary X-ray clerk, Cupis applied through the in-house applicant system for a permanent position as a clerk in the medical records department. Cupis was hired as a probationary employee starting on June 28. Cupis testified that at the time of her hire, she was told by Respondent's director of operations that she would be working under substantial stress and that the best way to handle the stress was to stay out of politics. Cupis testified that she understood this statement to be a warning to stay out of the Union. I do not draw the same inference from that statement. First, the Union and Respondent had a good working relationship and there was no evidence of animus against the Union. Second, the statement more likely was meant to be a general admonition to perform her work and to stay out of office politics.

Respondent and the Union are party to a collective-bargaining agreement. That agreement provides for a 3-month probationary period that may be extended for another 30 days. The bargaining agreement provides that probationary employees are not in the bargaining unit and that the failure to pass probation is not subject to the grievance procedure.

Cupis worked under the medical records department supervisor, Juanita Mosley. From the end of June until August 21, Mosley also served as the acting director of the medical records department. On August 21 Janet Lindenberg was appointed the director of medical records. Lindenberg had previously worked at a nonunion hospital and had no prior experience with unions.

On August 23, Respondent's clinic was subject to an audit by a governmental agency. These audits are very important for Respondent because they form the basis for funding from governmental agencies and other sources. This was Lindenberg's third day at her new job and she was not prepared when she was first informed of the audit by Mary Kalish, a quality assurance/risk management employee, who was in charge of the audit. The auditor had arrived a few days early and Juanita Mosley, who would normally pull the necessary files for the audit, was at lunch. Lindenberg, being new to the facility, was not familiar with the filing system. While attempting to get records for the auditor to start with and then complete the search for the entire list of 250 files requested by the auditor, Lindenberg asked Cupis to pull the files listed on a sheet of paper. According to Lindenberg and Kalish, Cupis refused saying that it was not her job to pull the charts. Cupis told Lindenberg that it was Mosley's job to pull the charts.

Cupis denied ever refusing to pull the charts. According to Cupis, she was asked whose job it was to pull the charts and she had responded that Juanita Mosley pulled the charts for the audits. I credit the testimony of Lindenberg and Kalish over Cupis' denials. Kalish is not an interested party in these proceedings. Further she has known Cupis for a long time and has been on a friendly basis with her. There is no reason for Kalish to testify falsely as to these matters.[1] Lindenberg's testimony is corroborated by her written notes generated shortly after the incident in question. Further, Mosley credibly testified that Lindenberg informed her of Cupis' refusal to pull the records upon Mosley's return from lunch.

About 1 week after assuming her new position as director, Lindenberg held a staff meeting to introduce herself to the employees. Lindenberg told the employees that she did not expect to make changes until after she had familiarized herself with the department. However, she observed that there were too many personal telephone calls and that she wanted that stopped. Several employees objected, including Yolanda, Tupekin, and Cupis. Tupekin said that she had young children and that she was concerned about emergencies. Lindenberg said that emergency calls were acceptable but that other personal calls should be conducted during lunch or breaks. Cupis stated that the union contract provided that personal calls under a minute were permitted.[2] Lindenberg responded that she wanted such calls stopped. Lindenberg's minutes of this meeting reflect only her statements that personal calls be minimized. There was no mention in the minutes of any employee dissent.

During the middle of September, Cupis and two other medical records clerks, Augustina Gallardo and Maritza Camarena, went to Lindenberg to complain about a fellow employee, Jerry Perkins. The three clerks believed that Perkins was not properly performing his job of bringing medical records to the nursing stations and that Perkins' failure was causing the medical records clerks to receive unwarranted criticism from the nurses and physicians. Cupis and Camarena spoke on behalf of the three clerks in relating the complaint to Lindenberg. Lindenberg told the employees that she would look into the matter. Lindenberg left Mosley a note regarding the complaint. This note mentioned that Cupis had complained about Perkins but did not mention that Gallardo and Camarena had made the same complaint.

Lindenberg admitted that Cupis' complaint about Perkins had irritated her. According to Lindenberg, the complaint further demonstrated that Cupis had a bad attitude. On September 27, Lindenberg wrote that because of Cupis' insubordination at the August 23 audit and because Cupis had instigated employee problems within the department, Lindenberg decided to dismiss Cupis. According to Lindenberg, ''it is apparent to me as a manager if I pass her through her probationary period that I would have problems with *every* employee in my department in regard to lack of respect and doing whatever they wanted to do. I also feel that most of the employee conflicts will stop once this employee has been terminated. For my department to run effectively I cannot allow either of these things to continue and feel it would be best to dismiss Sylvia.'' The only ''employee problems within the department'' were the complaints about Perkins. There is no evidence that Cupis or the other employees caused any disruption in making their complaint known to Lindenberg. Lindenberg passed on the complaint to Mosley, telling the supervisor to speak to Perkins and Cupis. Lindenberg did not tell Mosley that Cupis or the other employees had caused a disruption.

On September 27, the last day of Cupis' probationary period, Mosley complimented Cupis on her work performance.[3] Before lunch, Mosley told Cupis ''I'll be doing your evaluation, but don't worry, you're doing a very good job. You will be passing your probationary period.''

Mosley had lunch with Lindenberg that day and learned for the first time that Cupis would not pass her probation. Lindenberg told Mosley that because of Cupis' refusal to pull charts at the August 23 audit and because of Cupis' complaints about Perkins, Cupis was being let go before she could become a permanent employee.

After lunch, Mosley called Cupis into Lindenberg's office and Lindenberg then informed Cupis in Mosley's presence that the employee was not going to pass her probation. Lindenberg stated, '' I don't think we can get along if you keep working here.'' Cupis asked why she was being dis-

[1] General Counsel argues that Kalish should not be credited because she could not recall certain facts concerning this incident. I disagree. It appears to me that Kalish remembered clearly the significant and unusual fact of Cupis' refusal to pull charts. The fact that Kalish did not remember minute details or insignificant facts does not undermine her credibility.

[2] Cupis was referring to the work rules given to new employees which she thought were part of the collective-bargaining agreement.

[3] The evidence is uncontradicted that Mosley frequently complimented Cupis on her work. However, Mosley also testified, without contradiction, that she pointed out to Cupis that the employee also had to satisfy Lindenberg.

charged. Lindenberg answered that she did not want to talk about it and merely repeated that Cupis had not passed probation. Mosley did not speak during this meeting.

After meeting with Mosley and Lindenberg, Cupis returned to her workstation. Mosley approached Cupis and asked the employee to sign her timesheet. Cupis then asked why Lindenberg had fired her. Mosley answered that she did not know but reminded Cupis of the meeting where Cupis had mentioned the Union in regard to telephone calls. Mosley said that the incident had really turned Lindenberg off and Mosley snapped her fingers for effect. Mosley also mentioned the incident involving the August 23 audit.

The following day, Dr. Mark Tracy, the union steward, requested to speak with Lindenberg about Cupis' termination. Lindenberg said there was nothing to talk about and ended the conversation. Lindenberg would not discuss Cupis' termination because Cupis was a probationary employee.

Cupis and David Mendoza, the Union's field representative, met with Robert Gomez, Respondent's executive director in an attempt to save Cupis' job. Among other things, Mendoza proposed that Cupis' probationary period be extended citing the case of an employee whose probationary period had been extended by agreement between Respondent and the Union. Gomez said he would investigate the matter and then respond to Mendoza and Cupis.

Approximately 1 week later, Gomez met with Cupis and two union stewards. Mendoza was unable to attend. Gomez said he did not like the way the discharge had been handled but he would still support Lindenberg's decision. Gomez said he would allow Cupis to apply as an in-house applicant for other opportunities at Respondent's clinic. Gomez sent Cupis a letter dated October 13, repeating that Cupis would be considered as an in-house applicant for other employment. Gomez' position was that Respondent would not second-guess the decision of a supervisor to let go a probationary employee.

B. *Conclusions*

Section 7 of the Act provides that ''employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.''

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp*., 462 U.S. 393, 399–403 (1983).

For the following reasons, I find that General Counsel has made a prima facie showing that Respondent was motivated by unlawful considerations in terminating Cupis at the end of her probationary period. First, Juanita Mosley, Cupis' immediate supervisor, told Cupis that the employee would pass her probationary period without a problem. Thereafter, upon learning that Lindenberg was not going to pass Cupis, Mosley speculated that Cupis' reference to the union contract had caused this personnel action. Based on Mosley's statements and conduct, Cupis could only conclude that her failure to pass probation was based on her reference to the union contract at the staff meeting.

More importantly, Lindenberg's memorandum setting forth the reasons for the discharge included, along with Cupis' conduct at the August 23 audit, the additional ground that Cupis had caused an uproar in the department by complaining about employee Perkins. Cupis and two other employees had concertedly complained that Perkins' performance was adversely affecting their working relationship with the doctors and nurses. Lindenberg believed that this conduct would stop once Cupis was terminated. There is no evidence that Cupis or the other employees engaged in any misconduct in this regard. No facts were adduced to show any disruption in the department. Supervisor Mosely was not aware of any disruption. The evidence is clear that Lindenberg was unaware that Cupis' complaints about Perkins could be considered protected concerted activity under the Act.

The complaints of the three employees involving Perkins had an impact on employees' job interests and concerns. The three employees sought to bring these concerns to the attention of management. There was no evidence that the employees disrupted production. Nor was there any evidence that bringing these concerns to Lindenberg rather than Mosely was inappropriate. Accordingly, I find that Cupis, Gallardo, and Camerena were engaged in activities which were concerted and protected under Sections 7 and 8(a)(1) of the Act. *Fair Mercantile Co*., 271 NLRB 1159 (1984); *Pacific Coast Meat Co*., 248 NLRB 1376 (1980).

The burden shifts to Respondent to establish that the same action would have taken place in the absence of Cupis' protected conduct. The evidence convinces me that Lindenberg decided not to allow Cupis to become a permanant employee based on the perception that Cupis was disrespectful and that she and Cupis could not get along. The difficulty herein is that one of the two components of that decision involves activity which is protected under the Act. Contrary to the General Counsel's argument this is not a pretext case, rather this is a case of mixed motive.

An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the action, but must ''persuade'' that the action would have taken place even absent the protected conduct ''by a preponderance of the evidence.'' *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc*., 271 NLRB 443 (1984).

At the time of the discharge, Cupis' role in bringing the employees' complaint about Perkins to Lindenberg's attention was equally as important as the August 23 audit. Lindenberg's memorandum states ''I cannot allow either of these things to continue.'' At the trial, Lindenberg stated that the August 23 incident alone would have been sufficient to cause her to terminate Cupis' employment at the end of the probationary period. However, she also testified that the interdepartment complaints, standing alone, would have formed the basis of the same decision. Accordingly, I find that the termination of Cupis' employment for lack of respect had both a lawful and unlawful justification. Respondent has not made a distinction between the two reasons for the discharge and I cannot divide the two. I do not accept

Lindenberg's self-serving trial testimony that she would have let Cupis go in any event. Her memorandum concerning the two reasons for the dismissal casts a shadow over that testimony. Lindenberg terminated Cupis for two reasons, one of which was Cupis' protected concerted activity in bringing to management's attention, with other employees, the problems caused by another departmental employee. I find the two reasons weighed equally in Lindenberg's decision to discharge Cupis. Thus, I find that Respondent has failed to carry its burden under *Wright Line*, and that the discharge of Cupis violated Section 8(a)(1) of the Act. See *Bronco Wine Co*., 256 NLRB 53 (1981); *Hunter Douglas, Inc*., 277 NLRB 1179 (1985).

REMEDY

Having found that Respondent has violated Section 8(a)(1), I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall offer Sylvia Cupis immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position with out prejudice to her seniority or other rights and privileges previously enjoyed. Further, Respondent shall make Cupis whole for any loss of earnings and other benefits she may have suffered as a result of her unlawful discharge by paying her an amount equal to what she would have earned, less interim earnings as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

1. Respondent El Rio Santa Cruz Neighborhood Health Center, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. American Federation of State, County and Municipal Employees, Council 97, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging its employee Sylvia Cupis for engaging in protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]